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KETUA PENGARAH LEMBAGA HASIL DALAM NEGERI & SATU LAGI

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MAHKAMAH TINGGI MALAYA, MELAKA
MOKHTARUDIN BAKI H
[SAMAN PEMULA NO: MT1-24-291-2006]
12 FEBRUARI 2008

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PROSEDUR SIVIL: *Saman pemula - Perintah deklarasi - Permohonan - Bantahan awal - Sama ada tindakan suatu penyalahgunaan proses mahkamah - Sama ada tindakan untuk mencabar keputusan penjawat awam sepatutnya di bawah semakan kehakiman*
D *(judicial review) - Kaedah-kaedah Mahkamah Tinggi 1980, O. 53*

PROSEDUR SIVIL: *Bantahan awal - Tindakan memohon writ deklarasi - Sama ada suatu penyalahgunaan proses mahkamah - Sama ada tindakan untuk mencabar keputusan penjawat awam sepatutnya di*
E *bawah semakan kehakiman (judicial review) - Kaedah-kaedah Mahkamah Tinggi 1980, O. 53*

Pemohon/perayu di dalam tindakan ini memohon writ deklarasi (i) pemohon/perayu tidak berhutang RM62,321.61 iaitu merupakan tunggakan cukai yang perlu dibayar seperti yang telah diputuskan
F oleh responden pertama dan (ii) sijil yang dikeluarkan oleh responden pertama di bawah s. 104 Akta Cukai Pendapatan 1967 dibatalkan. Pihak responden kedua menimbulkan bantahan awal bahawa tindakan ini adalah suatu penyalahgunaan proses mahkamah kerana tindakan ini sepatutnya melalui semakan
G penghakiman (judicial review) dan bukan melalui saman pemula untuk perintah deklarasi.

Diputuskan (menolak permohonan pemohon):

H **(1)** Tindakan plaintif/perayu adalah untuk mencabar keputusan defendan/responden iaitu sebuah badan awam yang bertindak di bawah undang-undang. Tindakan untuk mencabar keputusan penjawat awam sepatutnya di bawah 'judicial review.' Ini selaras dengan pindaan kepada A. 53 Kaedah-kaedah
I Mahkamah Tinggi 1980 iaitu mulai 22 September 2000 semua

permohonan untuk mencabar keputusan pihak berkuasa awam hanya boleh dibuat melalui permohonan untuk semakan kehakiman (judicial review). Jelas tindakan plaintif/perayu adalah satu 'abuse of process of the court.' (perenggan 4, 5 & 13)

Kes-kes yang dirujuk:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(dirujuk)***

Cocks v. Thanet District Council [1982] 3 All ER 1135 ***(dirujuk)***

Lim Oh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 FC ***(dirujuk)***

O'Reilly v. Mackman [1982] 3 All ER 1124 ***(dirujuk)***

Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys Kuching Division & Anor [2004] 4 CLJ 775 HC ***(dirujuk)***

Subramaniam Vythilingam v. The Human Rights Commission of Malaysia (Suhakam) & Ors [2003] 6 CLJ 175 HC ***(dirujuk)***

Sugumar Balakrishnan v. Chief Minister of State of Sabah & Anor [1988] 1 LNS 210 HC ***(dirujuk)***

Teh Guan Teik v. Inspector General of Police & Anor [1998] 3 CLJ 153 FC ***(dirujuk)***

Perundangan yang dirujuk:

Income Tax Act 1967, s. 104

Rules of the High Court 1980, O. 18 r. 19, O. 53 r. 1

Supreme Court Rules UK, O. 53

Bagi pihak pemohon - WS Goh; T/n WS Goh & Assoc

Bagi pihak responden 1 & 2 - Suzana Atan; Peguam Kanan Persekutuan

Dilaporkan oleh Suhainah Wahiduddin

PENGHAKIMAN

Mokhtarudin Baki H:

[1] Pemohon/perayu di dalam tindakan ini memohon writ deklarasi:

1. Pemohon/perayu tidak berhutang RM62,321.61 iaitu merupakan tunggakan cukai yang perlu dibayar seperti yang telah diputuskan oleh responden pertama.

2. Sijil yang dikeluarkan oleh responden pertama di bawah s. 104 Akta Cukai Pendapatan 1967 tidak boleh dipertahankan (not sustainable) dan dibatalkan.

A **Bantahan Awal**

[2] Peguam Kanan Persekutuan bagi pihak responden kedua menimbulkan bantahan awal bahawa tindakan ini adalah suatu penyalahgunaan proses mahkamah.

B **[3]** Saya bersetuju bahawa tindakan ini sepatutnya melalui semakan penghakiman (judicial review) dan bukan melalui saman pemula untuk perintah deklarasi.

[4] Tindakan plaintif/perayu adalah untuk mencabar keputusan C defendan/responden iaitu sebuah badan awam yang bertindak di bawah undang-undang. Tindakan untuk mencabar keputusan penjawat awam sepatutnya di bawah 'judicial review'.

[5] Ini selaras dengan pindaan kepada A. 53 Kaedah-Kaedah D Mahkamah Tinggi 1980 melalui PU(A) 342/2000 iaitu mulai 22 September 2000 semua permohonan untuk mencabar keputusan pihak berkuasa awam hanya boleh dibuat melalui permohonan untuk semakan kehakiman (judicial review).

E **[6]** Keadaan yang sama berlaku di England di mana selepas 1977 (Law Reform) keadaan berubah. Ini jelas diputuskan di dalam kes-kes berikut:

(i) *O'Reilly v. Mackman* [1982] 3 All ER 1124:

F Isu yang perlu diputuskan dalam kes ini adalah seperti berikut:

The issue before the House of Lords is whether it is an abuse of the process of the court for the plaintiffs to commence a writ action to challenge a decision of a public authority, instead of proceeding by way of judicial review. The relevant part of the headnote reads:

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> Held, dismissing the appeals, that since all the remedies for the infringement of rights protected by public law could be obtained on application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was a declaration that the board of visitors adjudication

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against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoiding the protection afforded to statutory tribunals.

(ii) *Cocks v. Thanet District Council* [1982] 3 All ER 1135

Lord Bridge of Harwick memutuskan seperti berikut:

It follows from these considerations that proceedings in which an unsuccessful applicant for accommodation under the 1977 Act sets out to challenge the decision of the housing authority against him will afford another application of Lord Diplock's general rule and will amount to an abuse of the process of the court if instituted otherwise than by an application for judicial review under Ord. 53.

[7] Kes-kes yang diputuskan di Malaysia sebelum pindaan kepada A. 53 Kaedah-kaedah Mahkamah Tinggi 1980 pada tahun 2000 adalah seperti berikut:

(i) *Sugumar Balakrishnan v. Chief Minister of the State of Sabah & Anor* [1989] 1 MLJ 233

Isu yang dibangkitkan:

Defendan pertama dalam tindakan ini memohon kepada mahkamah untuk membatalkan permohonan plaintif di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau bidangkuasa tersirat mahkamah. Alasan permohonan defendan adalah permohonan plaintif walaupun dalam bentuk deklarasi, tetapi "in substance and effect" adalah untuk memohon satu perintah *certiorari* dan ianya telah dibuat tanpa memohon kebenaran sebagaimana yang dikehendaki di bawah A. 53 k. 1 dan dengan demikian, ianya adalah suatu penyalahgunaan proses mahkamah defendan pertama bergantung kepada dua kes di England iaitu kes *O'Reilly v. Mackman & Ors, supra,* dan *Cocks v. Thanet District Council, supra.* Mahkamah Tinggi memutuskan bawah Held (1):

The cases of *O'Reilly v. Mackman & Ors* [1982] 3 All ER 1124 and *Cocks v. Thanet District Council* [1982] 3 All ER 1135 were based on the new provisions of the English O. 53 which was introduced in 1977. They cannot be followed since the new English O. 53 and its statutory underpinning (under s. 31 of the UK Supreme Court Act) have not been accepted here.

di ms 236:

> With due respect, the *ratio decidendi* in the aforesaid two English cases cannot be followed here since we have not accepted the English new O. 53 and its statutory underpinning (that is to say, s. 31 of the English Supreme Court Act). Our present O. 53 is in *pari materia* with O. 53 under the pre-1977 English Rules. Therefore, there is no justification for me to depart from the principle enunciated by the highest court in England prior to January 1978 (the date of coming into force of the English new Rules) and which had been accepted by our courts. I am inclined to follow the decision in the Supreme Court case of *Government of Malaysia v. Lim Kit Siang; United Engineers (M) Bhd v. Lim Kit Siang* [1988] 2 MLJ 12, whereby the majority of the quorum declined to follow the English new O. 53 in relation to the rule of *locus standi*, and instead followed the rule of *locus standi* accepted by the highest court in England prior to the said new O. 53.

(ii) *Teh Guan Teik v. Inspector General of Police & Anor* [1998] 3 CLJ 153:

Isu yang dibangkitkan:

Isu yang dibangkitkan di Mahkamah Persekutuan ialah tentang apakah prosidur yang betul bagi seorang anggota polis yang dibuang kerja untuk mencabar keputusan tersebut yang dibuat oleh pihak berkuasa tatatertib iaitu samada melalui satu deklarasi atau *certiorari* atau salah satunya.

YA Peh Swee Chin memutuskan:

> The entrenched principle that declaration and *certiorari* are not mutually exclusive and are concurrent remedies was asserted several times in the United Kingdom and followed by our courts. First and foremost, O. 15 r. 16 of the Rules of the High Court 1980 provides for a right to sue by declaration, and as if to exalt such right, it says it shall not be open to objection even if no consequential relief is sought. To dislodge such a remedy by declaration from its entrenched position would require clear and strong words from a statute (see pp 147F and 148D, H); *Government of the Federation of Malaya v. Surinder Singh Kanda* [1962] MLJ 169; *Sungai Wangi Estate v. Uni* [1975] 1 LNS 172 and *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor* [1979] 2 MLJ 101 followed.

di ms 148:

> The defendant also raised a preliminary point that the High Court had no jurisdiction to adjudicate on the matter by declaration and that it could only be done by *certiorari*. It appears that the plaintiffs discovered the position of the lack of authority of the port manager 2 1/2 years after the said suspension, long after the time limit for applying for *certiorari*. The Court of Appeal unanimously held that the court had jurisdiction to grant a declaration, overruling the preliminary objection or point. Lord Denning said at p. 1009; 'If the tribunal does not observe the law, what is to be done? The remedy by *certiorari* is hedged round by limitation and may not be available. Why then should not the court intervene by declaration and injunction?
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> The next is *Vine v. National Dock Labour Board* [1957] 2 WLR 106, in which the plaintiff claimed for a declaration that his dismissal was void, *ultra vires* and illegal. A preliminary point from the defendant that the claim was incompetent and the only remedy was by *certiorari* was raised and dismissed. The House of Lords upheld the decision and held that the court had jurisdiction to grant the declaration.
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> Yet another is the case of *Pyx Granite Co Ltd v. Ministry of Housing and Local Government* [1960] AC 260. Pyx claimed declarations in court that certain ministerial decisions were invalid in regard to their proposed development of their land. The Minister raised the objection that the court had no jurisdiction to grant a declaration asked for, on the ground that Pyx should have applied to the local authority to determine the proposed development under s. 17 of the Town and Country Planning Act 1947. It was held that the provision of an alternative method of having the question determined did not preclude the court from granting declaration. Viscount Simonds made, in the course of delivering judgment, the *dictum* cited earlier. In the same case, Lord Goddard, who dealt with the argument advanced that if there was a remedy in the High Court, it must be by way of *certiorari* and not by declaration, had this to say at p. 290:
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> > I know of no authority for saying that if an order or decision can be attacked by *certiorari*, the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive.

> In passing, also in order to lay any possible spectre of any future contention of *per incuriam* against the present decision of this court for not mentioning the case of *O'Reilly v. Mackman* [1982] 3 All ER 1124 which held the litigant in that case to a remedy of *certiorari* and not allowing the remedy of declaration, I will say a few words about this case.
>
> Of course, it was feared that the remedy of declaration would virtually destroy the remedy of *certiorari* by replacing the latter and this, *inter alia*, led in 1977 to the law reform as embodied in O. 53 of the Rules of Supreme Court of England which is different from our own O. 53 of the RHC. Order 53 of England brought ten main changes to the earlier O. 53, according to the White Book of 1979 at p. 842; please see the changes set out there. The House of Lord's decision of *O'Reilly v. Mackman*, in interpreting such changes brought about by the law reform has, according to the guru of administrative law Prof Wade in *Administrative Law* (6th Ed) at p. 678, caused 'great uncertainty' and a serious setback for administrative law'. The decision was expressly not followed, for obvious reasons, in our courts, eg in *Sugumar*'s case and was also not followed by the Court of Appeal of Singapore. The decision is not relevant to us and need not be discussed further, based as it was on the law reform, which we have, with all deliberateness. not adopted in our RHC.

[8] Di dalam kes tersebut di atas, mahkamah telah memutuskan bahawa *certiorari* dan deklarasi adalah "mutually exclusive". Mahkamah telah menolak prinsip undang-undang yang diputuskan di dalam kes *O'Reilly v. Mackman, supra,* kerana pada ketika itu peruntukan A. 53 Kaedah-kaedah Mahkamah Tinggi yang terpakai di negara ini adalah berbeza dengan Supreme Court Rules di England.

[9] Walaubagaimanapun dengan pindaan kepada A. 53 Kaedah-kaedah Mahkamah Tinggi 1980 yang adalah *pari materia* dengan A. 53 Supreme Court Rules di England, prinsip undang-undang yang diputuskan di dalam kes *O'Reilly v. Mackman, supra*, adalah terpakai kepada kes-kes di sini. Kes-kes tersebut akan dibincangkan selanjutnya.

[10] Melalui PU(A) 342/2000, A. 53 Kaedah-kaedah Mahkamah Tinggi 1980 telah dipinda secara keseluruhannya yang mana keseluruhan prosidur dipanggil "Permohonan Untuk Semakan Kehakiman".

[11] Remedi yang terkandung di bawah A. 53 Kaedah-kaedah Mahkamah Tinggi 1980 yang baru ini adalah lebih luas dengan memasukkan relif-relif yang dinyatakan di dalam perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 dan juga perintah deklaratori dan injunksi.

[12] Pindaan kepada A. 53 Kaedah-kaedah Mahkamah Tinggi 1980 ini adalah *pari materia* dengan peruntukan Supreme Court Rules di England selepas tahun 1977. Kes-kes yang telah diputuskan selepas pindaan kepada A. 53 Kaedah-kaedah Mahkamah Tinggi 1980 adalah seperti berikut:

(i) *Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys Kuching Division & Anor* [2004] 4 CLJ 775

Isu yang diputuskan dalam kes ini adalah seperti berikut:

The issues for consideration before the court were (a) whether the plaintiffs were by this suit seeking relief or remedy for the infringement of rights protected by public law or private law; and (b) if it is held that the plaintiffs were enforcing their rights under public law and should therefore seek their remedy under O. 53 of the Rules of the High Court 1980 ('RHC'), whether their claims fell within the exceptions to the general principal stated in *O'Reilly v. Mackman, supra.*

YA Hakim di ms 786 memutuskan:

> I regret I do not agree with the above submissions and say so for the following reasons: In the first place, both the Minister (who issued the Direction) and the 1st defendant (who rejected the plaintiffs' claims to compensation) acted under powers conferred upon them by s. 5(3) of the Land Code, and are public authorities whose decisions are subject to supervisory control of the court through process of judicial review under O. 53 RHC. In the second place, although the plaintiffs say that the native customary rights which they claim to have over the said lands are pre-existing rights and proprietary rights which are private rights, it was pointed out by counsel for the defendants, and in my view correctly, that native customary rights by reason of s. 5(1) of the Land Code can only be created or acquired 'as from 1 January 1958' by any of the methods specified in sub-s (2), upon Interior Area Land and s. 5(2) spells out 'the methods by which native customary rights may be acquired', while Proviso (ii) to sub-section (2) reads:

> the question whether any such right has been acquired or has been lost or extinguished, save in so far as this Code makes provision to the contrary, be determined by the law in force immediately prior to 1st January 1958.

…

So although the plaintiffs say that the native customary rights which they claim to have acquired (through persons who had created those rights before 1958) are proprietary in nature, the fact remains that the rights which they claim are rights created or recognised by statute, or put in another way, they are rights protected by public law. The plaintiffs' alleged native customary rights do not arise out of any private contract or arrangement between the plaintiffs and the Government (the defendants here), or put in another way, there is no infringement of a right of the plaintiffs arising under private law.

It is for the above reasons that I agree with the contention of counsel for the defendants that the plaintiffs' remedy to enforce or protect rights created or acquired or recognised in accordance with the provisions of the Land Code must be sought under public law and not private law. That being the case, the plaintiffs here should have proceeded to seek judicial review of the Minister's Direction and 1st defendant's decision under O. 53 RHC, unless of course they can bring themselves within the exceptions to the general rule stated in *O'Reilly v. Mackman (supra)* which is the next question I will address.

Do the plaintiffs' claims fall within the exception to the rule in *O'Reilly*'s case?

Lord Diplock recognised that there were certain exceptions to the general rule referred to by him in that case. This is what he said at p. 285:

> My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons.

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… The plaintiffs say none of the parties objected to their writ action. I do not think this accurately describes what has happened here. The defendants' application did include a prayer, in the alternative, that the plaintiffs' writ of summons and statement of claim be struck out on the grounds, *inter alia*, that the plaintiffs' action is an abuse of the process of court. Although the defendants did not initially address the court on the issue of abuse of process and it was the court that invited the parties to do so, I did not think it wrong to do so as the court is always vigilant to see that its process is not abused and the facts before the court called for a closer scrutiny of the route taken by the plaintiffs. Accordingly, I do not think this exception avails itself to the plaintiffs.

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It is also my view that the first prayer sought by the plaintiffs herein, that the said Direction was 'null and void and of no legal effect', although couched or cast and sought as a declaration, is clearly in the nature of a *certiorari* to have the Direction quashed for the same grounds and reasons stated in the suit, but the plaintiffs have attempted to circumvent the protections afforded to public authorities by O. 53 RHC, particularly the requirement to obtain leave.

In arriving at the above conclusions I have not overlooked a submission of the plaintiffs that the court should not by the mere characterisation of the plaintiffs' claim as one founded in public law, exclude them from having their claims considered by an, ordinary action. According to counsel for the plaintiffs, to do so would create procedural exclusivity or dual system of law leading to rigidity and procedural hardship for plaintiffs in the choice of forms of action, which would defeat the flexibility which the new O. 53 RHC was supposed to afford when seeking relief. According to counsel this was especially so as there is no saving provision found in our O. 53 which is equivalent to the English O. 53 r. 9(5) which allows the court to convert an application for judicial review into a writ action in the event the wrong form of action was selected. I have tried in the course of this judgment to show that for the reasons given, this is not a case where the plaintiffs' claims have been simply characterised as one arising in public law. Further, since the amendment to O. 53 RHC, all the reliefs

A and remedies which the plaintiffs seek in this action were at its commencement available to them under O. 53 and the court has not put any obstacles in their way to avail themselves of the flexibility afforded by the new O. 53, but if they have not availed themselves of it the court should not be blamed for any hardship they now face as a result of the route they have chosen. With regard to the submission that the Court should not interpret the new O. 53 in such a way as to create rigidity and procedural exclusivity leading to a dual system of law, I should point out that the Courts in Malaysia have for a long time now recognised the distinction between public law rights or remedies and private law rights or remedies. See *Baltim Timber Sdn Bhd v. The Minister of Resource Planning & 2 Ors* [1993] 2 CLJ 327; see *Subramaniam a/l Vythilingam v. The Human Rights Commissioner of Malaysia (Suhakam) & 5 Ors* [2003] 6 CLJ 175; see *Yahya bin Kassim v. Government of Malaysia* [1997] 3 MLJ 749; see *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339.

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The Minister's Direction extinguishing the alleged native customary rights of the plaintiffs was dated 14 November 2001 (see para 7 of the statement of claim). The plaintiffs knew about this Direction because on 4 March 2002 they submitted their claims for compensation. Under O. 53 r. 3(6) RHC an application for leave to apply for judicial review must be made within 40 days when the grounds for the application first arose or when the decision is first communicated to the applicant. The plaintiffs certainly knew of the Direction prior to 4 March 2002 when they submitted their claim for compensation to the 1st defendant. When this action was commenced on 14 November 2001 more than eight months had passed since the Direction was made. No application had been made by the plaintiffs to extend the statutory period to apply for leave. So it is unlikely leave would have been granted. In addition to what is said above, it should be noted that the plaintiffs had originally proceeded as if they accepted the validity or legality of the Minister's Direction by submitting their claims for compensation pursuant to the Direction. It was only when their claim for compensation was rejected that they questioned the legality of the Direction ...

In the result, for all the reasons given above, I hold that it was an abuse of process for the plaintiffs to resort to an action for declaration and thereby evade the clear requirements of O. 53 RHC.

(ii) *Lim Oh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233

YA Steve Shim memutuskan:

> Given the view which we take that there was clearly in existence a peremptory order of the court, and that the learned SAR had struck the appellants' first suit out for disobedience of that peremptory order, we agree with the Court of Appeal's conclusion that the appellants ought to have appealed against that decision and that the filing of the second suit, containing as it did, the same issues and reliefs as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court.

(iii) *Subramaniam Vythilingam v. The Human Rights Commission of Malaysia (Suhakam) & Ors* [2003] 6 CLJ 175

Mahkamah memutuskan di Held (3a) seperti berikut:

> The plaintiffs should have pursued his public law remedy through judicial review proceedings under O. 53 RHC and not by way of originating summons. By not pursuing the remedy through O. 53, the plaintiff was deliberately attempting to get around the stringent requirements enumerated in O. 53 RHC, including *inter alia* the need to serve the leave application on the Attorney General's Chambers. Enclosure (1) thus constituted an abuse of the process of the court and ought to be struck out.

(iv) *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585

Mahkamah di ms 616 telah memutuskan seperti berikut:

> Now assuming that there was a duty on the 4th defendant to act in a particular manner towards the property of the plaintiffs post collapse, such duty must find its expression in public and not private law. Accordingly, if there had been a failure on the part of the 4th defendant to do or not to do something as a public authority, the proper method is to proceed by way of an application for judicial review.

A **[13]** Dari keputusan kes-kes di atas jelas tindakan plaintif/perayu adalah satu 'abuse of process of the court'.

[14] Dengan alasan-alasan di atas saya memutuskan permohonan pemohon ditolak dengan kos.

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